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IN THE

# Supreme Court of the United States

October Term, 1956

CITY OF EL PASO,

*Petitioner,*

—vs—

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

*Respondents.*

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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CITY OF EL PASO,

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—vs—

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. McCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

*Respondents.*

## Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, the City of El Paso, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on April 2, 1957, which reversed the favorable parts of a judgment for Petitioner entered by the United States District Court for the Western District of Texas, and affirmed those parts in favor of Respondents.

## JURISDICTION

The United States Court of Appeals in its Opinion, decided questions contrary to former decisions of the Supreme Court of the United States.

The Court of Appeals Opinion in this case decided questions contrary to Section 8 of the United States Reclamation Act (Title 43 U.S.C.A. Section 383).

The Court of Appeals decided an important state question in a way that is in conflict with the applicable state law.

The Court of Appeals in its Opinion decided a Federal question in this case in a way that is in conflict with applicable decisions of this Court.

This Court further has jurisdiction under the Act of June 25, 1948, Chapter 646 (62 Stat. 933, U.S. Code, Title 28, Section 1345) in that it is a civil action suit or proceeding where the United States is Plaintiff.

The Court of Appeals has decided an important Federal question which has not been settled by this Court, to-wit, the effect of the Rio Grande Compact.

The Court of Appeals in its Opinion has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

## OPINIONS BELOW

The Opinion of the District Court is reported in 133 F. Supp. 894, and is also printed in the Record (R. 1752-1765).

The case was submitted to the United States Court of Appeals for the Fifth Circuit on January 30, 1957 before Honorable Joseph Hutcheson, Ben F. Cameron and Warren L. Jones, Circuit Judges. On April 2, 1957 the Honorable United States Court of Appeals for the Fifth Circuit entered judgment granting all points urged on appeal by Respondents, and refusing all points urged on appeal by the Petitioner. Petitioner therefore presents its Petition for Writ of Certiorari to this Honorable Court as authorized by judicial code, Section 240 as amended (*Title 28, Section 347, U.S.C.A. and Title 28, Section 1254 U.S.C.A.* as amended).

## THE QUESTIONS PRESENTED

There are a number of questions of error in this suit as set out in Petitioner's Petition for Rehearing (R. 1829 to 1834). However, Petitioner feels that the questions herein stated are controlling in this case, and raise the most important issues involved:

*No. 1*: The first question presented is whether the effect of the Rio Grande Compact between the States of Texas, New Mexico and Colorado, commonly referred to as the Rio Grande Compact, set out in *Article 7466e-1* of the Revised Statutes of Texas (approved by the Congress of the United States May 31, 1931) is to divide the waters of the Rio Grande equitably among the three states, or, as held by the Court of Appeals without citation of authority or reference to the Record, that certain waters above Fort Quitman, Texas were committed to the primary service of the Bureau of Reclamation's Rio Grande Project.

*No. 2*: The question of whether the Court of Appeals erred in holding that the City of El Paso could not take pay-free from the bed of the Rio Grande, located in the City of El Paso, a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which does not decrease the amount of water available to any downstream users in any amount.

*No. 3*: The question of whether or not the Court of Appeals erred in holding that Respondent District is not legally liable in this case to Petitioner City for the sum of $44,427.59 as the cost of replacing the bridges across the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges, where the District had refused to replace such bridges as they were obligated to do, and where no money was appropriated by Congress therefor.

*No. 4*: The question of whether or not the Court of Appeals erred in holding that Respondent District is not legally liable where it is reasonably necessary at any crossings described in the quit-claim deed from the City of El Paso to the United States of America, dated November 9, 1939, to replace bridges at such crossings reasonably required to maintain adequate structures for the common traffic across the Canal at such crossings when no money is appropriated by Congress therefor, or whether the Court of Appeals was correct in giving a "strait-jacket" definition to the word "maintain," contrary to the holding of the Trial Court.

*No. 5*: The question of whether the Court of Appeals erred in holding that the Petitioner's Ordinance dated November 9, 1939 is valid and binding on the City, and

in holding that the quit-claim deed dated November 9, 1939 from the City of El Paso to the United States of America is valid, and therefore Respondents were not required to obtain a franchise for the Franklin Canal across the streets of the City of El Paso, or whether the Respondents could not lawfully occupy the streets of the City of El Paso without a franchise.

*No. 6:* The question of whether or not the Court of Appeals erred in enjoining the City of El Paso, its Mayor, Engineers, and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water from the river bed of the Rio Grande or from the Franklin Canal, except in the manner and in accordance with th ights of said City of El Paso as fixed and determined by the Contract of August 10, 1949 (R. 485), or whether the Contract is without consideration, and lacks mutuality as held by the Trial Court.

## STATUTES INVOLVED

Article 7466e-1 Revised Statutes of Texas (Rio Grande Compact); Title 43 U.S.C.A., Section 383, and 41 Stat. 451 (Section 8, Reclamation Act).

## STATEMENT

This suit was originally brought by Respondent, El Paso County Water Improvement District No. 1, and various individual farmers, against Petitioner, City of El Paso, United States of America, and Hudspeth County Conservation and Reclamation District No. 1. Subsequently, the Hudspeth County Conservation and Reclamation District No. 1 was dismissed as a party Defendant, and the United States of America became a party Plaintiff.

This suit was brought by Respondents for the following relief:

(1) To prohibit the City of El Paso (hereinafter referred to as "City") from using any waters of the Rio Grande for domestic and municipal purposes without payment to the District of charges, the water to be taken only under the conditions and limitations as set forth in alleged contracts which the City claims to be void for various reasons, such as being ultra vires the City, against public policy, without considerations deemed valuable in law, and without authority on the part of those attempting to bind the parties to said contract.

(2) To determine the right of the City to compel the District to maintain adequate bridges across the Franklin Canal after Congress has failed to appropriate money therefor, wherein said Canal lies in and across various public streets and alleys of the City.

(3) To determine the validity of the claim of the District to use the public streets and alleys of the City without a franchise for an irrigation canal.

(4) To determine the claim of the District to prohibit the City from using the bed and banks of the Rio Grande for the carriage of well water delivered into the Rio Grande by the City and diverted by it at its water treatment plant on the American bank of the Rio Grande, and to determine the claim of the right of the District to charge for the use of said river as a carrier.

(5) To determine the validity of the claim of the District to prohibit the City from taking from the Rio Grande an amount of Project water equal to the effluent

which the City discharges into the river, the taking and discharge being within the city limits of the City, and not within the geographic boundary of the El Paso County Water Improvement District No. 1.

(6) To determine the validity of the claim of the District to limit the use of and the amount of water which the City may take from the Rio Grande under a permit from the Board of Water Engineers from the State of Texas for 27,000 acre feet per annum.

(7) For money claimed to be due and owing by the City to the District for the carriage of water. (R. 13-50).

The City of El Paso contends that:

(1) The City has title to one-half of the beds and channels and of the abandoned beds and channels of the Rio Grande within the present and future corporate limits of the City, and that lands are located in the City which has riparian rights as to privately owned lands lying within the City, and not within the geographic limits of the El Paso County Water Improvement District No. 1, and that the owners of such lands and the City have the right to obtain water from the Rio Grande for domestic and municipal use prior and superior to any claim of the District.

(2) The District illegally maintains and operates an irrigation canal called the Franklin Canal, which it has so maintained and operated since July 6, 1939, located in part in some of the public streets and alleys of the City of El Paso without having secured a franchise from the City as required by its charter, and the laws of the State of Texas.

(3) The District illegally claims complete control and ownership of the Rio Grande, including riparian and storm and flood waters thereof, as the District has no permit or permits from the Board of Water Engineers of the State of Texas for said waters excepting a very minor amount, and has no other valid claim to such water.

(4) The District collects and stores water of the Rio Grande belonging to the City without right of State or Federal Law, thereby depriving the City of water which it is legally entitled to use.

(5) The City is entitled to take pay-free from the bed of the Rio Grande located in the City of El Paso, a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande.

(6) The City is entitled to recover the sum of $51,397.69 for bridges which it was required to build over the canal wherein the same lies in the public streets and alleys of the City of El Paso, and to recover the additional sum of $12,872.22, which sum was illegally collected by the District from the City of El Paso for the transportation of water.

(7) The City is entitled to an injunction against the Respondents restraining them from interfering with the City's use of waters of the Rio Grande, to which it is legally entitled (R. 51-76).

This case was tried by the Honorable Joseph B. Dooley, without a jury, and decree was entered on August 1, 1955 (R. 1731-1744) and as amended September 28, 1955 (R. 1752-1764). The Honorable Trial Court held that the City was entitled to take pay-free from the bed of the

Rio Grande located in the City of El Paso, a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande (R. 1735-1737).

The Trial Court further held that the City was entitled to judgment against the District for $44,053.95 incurred by the City in placing reasonably adequate bridges over the Franklin Canal at Piedras Street and Verde Street respectively in the City of El Paso, and the District was obligated to maintain adequate structures for the common traffic across the Franklin Canal at street crossings, where no money is appropriated by Congress therefor. The Trial Judge ruled against the City on its other contentions herein, and held for the District on those contentions (R. 1731-1765). The opinion of the Trial Court in which he deals with the various questions involved is found in the Record (R. 1658-1731). The District appealed to the United States Court of Appeals for the Fifth Circuit, as to all points decided adversely to it, and the City filed a cross appeal as to all points decided adversely to the City.

On April 2, 1957, the United States Court of Appeals for the Fifth Circuit entered its judgment in this case, holding in favor of the District on all points urged by it on appeal, and holding against the City on all points urged by it on cross appeal (R. 1828). The City filed its Petition for rehearing in this case with the United States Court of Appeals for the Fifth Circuit on April 15, 1957, and set out twelve points of error (R. 1829 to 1834). This Petition was in all things overruled by the Court of Appeals on May 24, 1957 (R. 1835 to 1836). Circuit Judge Cameron dissented and held that the Decision of the Trial Court should be affirmed *in toto*. (R. 1835-a).

The City most strongly urges in this case that the Court of Appeals erroneously held that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of El Paso a quantity of Project water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande.

The City also strongly urges that the Court of Appeals erred in holding that the District is not legally liable to the City of El Paso for the sum of $44,427.59 as a cost of replacing bridges across the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges.

Also, the Court of Appeals erred in holding that it was unnecessary to decide that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

It appears from Respondent District's Complaint that it is a legal and valid conservation and reclamation district organized under the laws of Texas, with its principal office in El Paso County, Texas. It also appears that the United States of America is a party Plaintiff (R. 14). It also appears that the amount in controversy, exclusive of interest and costs, exceeds $3,000.00 (R. 37).

This Court has jurisdiction under the Act of June 25, 1948 (62 Stat. 930, U. S. Code, Title 28, Section 1331) in that this is a civil action wherein the matter in controversy exceeds $3,000.00 exclusive of interest and costs, and arises under the Constitution, letters or treaties of the United States as hereinafter more fully shown in detail.

## SPECIFICATION OF ERROR

The Court of Appeals erred as follows:

(1) On the First Question—

(a) In holding that the United States was authorized to take all of the waters of the Rio Grande and commit the same to the Rio Grande Project of the Bureau of Reclamation without authority of State or Federal Law.

(b) In holding that the Rio Grande Compact did not apportion the waters of the Rio Grande equitably among the contracting states.

(c) In holding that Section 8 of the Reclamation Act (Section 8, 32 Stat. 390) did not require the Secretary of the Interior to proceed in conformity with State Law in appropriating waters of the Rio Grande.

(2) On the Second Question—

In holding that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of El Paso a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which does not decrease the amount of water available to any downstream users in any amount. (*Texas Company v. Burkett*, 296 S.W. 273, 276, *Supreme Court of Texas; Humphries-Mexia Company v. Arseneaux*, 297 S.W. 225, 229, *Supreme Court of Texas*).

(3) On the Third and Fourth Questions—

(a) In holding that Respondent District is not legally liable in this case to Petitioner City for the sum of $44,427.59 as the cost of replacing the bridges across

the Franklin Canal at Piedras Street and Verde Street in the City of El Paso with bridges reasonably necessary to adequately care for the common traffic across such bridges, where the District had refused to replace such bridges as they were obligated to do, and where no money was appropriated by Congress therefor.

(b) In holding that the word "maintain" as used in the quit-claim deed dated November 9, 1939 from the City of El Paso to the United States of America only required the Respondent District to repair bridges constructed in 1911, and did not require that bridges be maintained at such crossings which were reasonably necessary and adequate for the common traffic across the canal at such crossings. (*Davis Holding Company v. Wilcox*, 153 A. 169, 172, Supreme Court, Connecticut; *Rhodes v. Mummery*, 48 Ind. 216; *City of Denver v. Denver City Cable Car Railway Co.*, 45 P. 434, 440; *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065).

(4) On the Fifth Question

In holding that the ordinance and quit-claim deed of November 9, 1939 granted to the United States of America a perpetual right of way in the streets and alleys of the City of El Paso for the maintenance of an irrigation canal without compliance with the plain wording of the Charter of the City of El Paso. (Sections 35, 36 and 37 Plaintiff's Exhibit No. 15; R. 227-229, Appendix "A").

(5) On the Sixth Question

In enjoining the City of El Paso, its Mayor, Engineers and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water

from the river bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with the rights of said City of El Paso as fixed and determined by the contract of August 10, 1949 (R. 485), which contract is without consideration and lacks mutuality. (*Dalhart v. Childers*, 18 F. Supp. 903; *Foster v. Waco*, 225 S.W. 1104; *City of Paris v. Sturgeon*, 110 S.W. 459; *City of Teague v. Sheffield*, 26 S.W. 2d. 417; *City of Bryan v. Page*, 51 Tex. 532).

## REASONS FOR GRANTING WRIT OF CERTIORARI

### I.

The United States Court of Appeals in its Opinion decided questions contrary to former decisions of the Supreme Court of the United States. *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332; *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568; *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82.

The Court of Appeals Opinion in this case decided questions contrary to Sec. 8 of the United States Reclamation Act (*Title 43 U.S.C.A. Section 383*).

The Court of Appeals in its Opinion has decided a Federal question in this case in a way that is in conflict with applicable decision of such Court. *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425.

The Court of Appeals has decided an important Federal question which has not been settled by this Court, to-wit, the effect of the Rio Grande Compact. *Louisiana*

*v. Texas,* 20 S. Ct. 251, 176 U.S. 17, 44 L. Ed. 347; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202.

## ARGUMENT UNDER FIRST QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in refusing to set aside that portion of the judgment of the Trial Court which held that the waters of the Rio Grande are definitely committed by prior right under the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas (approved by the Congress May 31, 1931) to the service and use of the lands in the Rio Grande Reclamation Project lying in the States of New Mexico and Texas. It also erred in holding that it was unnecessary to decide that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

This holding is contrary to the provisions of the Rio Grande Compact entered into between the States of Colorado, New Mexico and Texas on March 18, 1938 set out in *Article 7466c-1* of the Revised Statutes of Texas. (Appendix "B"). This Compact, as will be seen further on in this Petition, only attempts to allocate water between the States, and not to individuals within a State once it has reached a State.

This holding is also contrary to the provisions of the Reclamation Act in connection with the rights of the United States. *Title 43 U.S.C.A.* Section 383 (Section 8, Reclamation Act) (Appendix "C") provides as follows:

> "Nothing in this chapter shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder."

This Act has been passed upon by the Supreme Court of the United States in several cases wherein the United States claimed as they do in the case at bar that they have either an allocation of the water, or are the owners of unappropriated waters of streams.

The Supreme Court in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815, said that water of a stream withdrawn for a project was not an appropriation of that water by the United States. Quoting from the earlier case of *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568, it was held:

> "The Bill alleges and we know as a matter of law that the Secretary and his agents acting by the authority of the Reclamation Act and supplementary legislation must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the law."

Under these decisions the United States did not acquire any rights in the so-called Project waters and the rights of the individual land owners and irrigation districts could only be acquired to waters by complying with the laws of the state or territory.

In *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82, 81 L. Ed. 525, the Supreme Court announced the same rule again and went further and said that the manner of diversion

and storage of waters by the United States did not constitute appropriation, and the laws of the State had to be complied with in respect to such appropriation. The case of *Kansas v. Colorado*, 51 L. Ed. 956 at page 973 quotes Section 8 of the Reclamation Act (43 U.S.C.A. Article 383), and after quoting this Act, the Court states:

> "But it is useless to pursue the inquiry further in this connection. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

The decision in the case at bar is also contrary to the decision of the United States Court of Appeals for the Fifth Circuit in *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425, in which it was stated at page 430:

> "Although the Government diverted, stored and distributed the water, the contention of Petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded."

The Court further stated at page 429:

> "Nothing in Sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this Title shall be construed as affecting or intended to affect, or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary in carrying out the provisions of such sections shall proceed in conformity with such laws."

The Honorable Trial Court clearly erred in holding that the Rio Grande Compact controlled the use and distribution of the waters of the Rio Grande after the same reached the boundaries of the State of Texas, which opinion, at least by implication, was affirmed by the Court of Appeals. It is of utmost importance not only to the State of Texas, but to the people residing in the State of Texas, and also to the States of Colorado, and New Mexico, and the people residing in those states, that the Supreme Court determine the legal effect of the Rio Grande Compact. No decision has been rendered determining the effect of that Compact by the Supreme Court.

The Honorable United States Court of Appeals in its Opinion at page 4 stated it is unnecessary for it to discuss many of the matters dealt with in the briefs in this case, and it is particularly so as to Plaintiff's contention that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande Compact between Colorado, New Mexico and Texas.

It is Petitioner's earnest belief that this case cannot be decided simply by a statement rejecting all theories of Petitioner, and adopting all theories of Respondent. This is particularly true for the reason that such holding ignores the provisions of the Rio Grande Compact upon which the Trial Court based his Opinion with reference to the parties' rights to the water of the Rio Grande, and it is particularly true for the reason that the Opinion of the United States Court of Appeals and the Opinion of the Trial Court are contrary to the several decisions of the United States Supreme Court cited herein, which have uniformly held that the waters of a stream such as the Rio Grande were under the control of the State and the

Reclamation Act has uniformly so held. The opinion of the Court of Appeals in this case is also contrary to its holding in the case of *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d. 425, at page 430. It is Petitioner's belief that it is of the utmost importance to all states in which irrigation rights are involved, and to the people of such states that this most important question and these most important decisions of the United States Supreme Court be not overruled, by simply a general statement of the Court of Appeals that it was not necessary to consider the matters in the briefs filed herein. This alone would, in Petitioner's opinion, constitute a sufficient grounds for the granting of the Petition for Writ of Certiorari in this case.

The Reclamation Act, *Title 43 U.S.C.A., Sec. 383* (Section 8, Reclamation Act) certainly does not support the Opinion of the Court of Appeals. It provides as follows:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (Appendix "C")

The Rio Grande Compact (*Art. 7466c-1* of the Revised Statutes of Texas) does not support the opinion of the Court of Appeals. It provides in part as follows:

"The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of the States, and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners." (Appendix "B")

Petitioner, The City of El Paso, complied with the State law and obtained a permit to appropriate 27,000 acre feet per annum from the Rio Grande. (Respondents' Exhibit No. 31).

Petitioner respectfully urges that the Opinion of the Court of Appeals denying the City of El Paso the right to take water from the Rio Grande when it holds a permit from the State of Texas is contrary to the Reclamation Act, the applicable Decisions of the United States Supreme Court, the Water Laws of Texas, and decisions of the Appellate Courts of that State, and is not supported by the Rio Grande Compact.

Compacts between the States were authorized by the Constitution of the United States (Art. 1, Section 10, Cl. 3). Such compacts or contracts are encouraged. (*Louisiana v. Texas*, 20 S. Ct. 251, 176 U.S. 17, 44 L. Ed. 347; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202; *State ex rel. Dyer v. Sims*, 71 S. Ct. 507, 341 U.S. 22, 95 L. Ed. 713).

The Supreme Court of the United States has the final jurisdiction over such compacts, and has the final power

to pass upon the meaning of them. (*Delaware River Joint Toll Bridge Comm. v. Colburn*, 310 U.S. 419, 60 S. Ct. 1039, 84 L. Ed. 1283; *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202). The Supreme Court of the United States has never passed upon the Rio Grande Compact. It has only been passed upon by the Court of Appeals in this case by implication, and certainly this important compact and its meaning should be settled by a decision of the Supreme Court of the United States, because the rights of the Petitioner to the waters of the Rio Grande are dependent upon the correct interpretation thereof.

II.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. (*Texas Co. v. Burkett*, 296 S.W. 273; *Humphreys-Mexia Co. v. Arsenaux*, 297 S.W. 225).

## ARGUMENT UNDER SECOND QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit, erred in holding that the City could not take pay-free from the bed of the Rio Grande located in the City of El Paso, a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, and which action does not decrease the amount of water available to any downstream users in any amount.

The undisputed evidence is that the effluent has been used for many years by Respondents, and that they take into consideration the amount of effluent in determining how much water is released from storage facilities (R. 890).

In the case of *Texas Co. v. Burkett*, 296 S.W. 273 Supreme Court of Texas) at page 276, the Court stated:

> "Apparently it is only a prejudicial diversion of water charges prohibited by the statutes of this state."

In the case of *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225 (Supreme Court of Texas), it was held at page 229:

> "Upon the principle stated it is obvious that a court of equity would not, even at the suit of a riparian owner, enjoin the diversion of riparian water, unless the complainant was injured thereby, or under circumstances that would reasonably show a hostile and adverse user of sufficient moment to set in motion the statute of limitation, or prescription."

In the case of *Nolte Irrigation Co. v. Willis*, 180 S.W. 2d. 451 (Court of Civil Appeals, writ refused), it was held at page 451:

> "Where defendant violated plaintiff's statutory right by impounding surface waters, but plaintiff failed to establish that his damage was serious or would be serious, refusing to grant permanent mandatory injunction requiring defendant to remove dams and embankments or to make and maintain adequate spillways was not an abuse of discretion."

In the case of *United States v. Union Gap Irrigation Company*, 209 F. 274, it was held at page 277:

> "The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its own prejudice."

The authorities uniformly hold that as long as a person withdrawing water, replaces as much as he takes out, there is no damage, and no one can complain of such use or withdrawal of water.

There is no provision in the contract of August 10, 1949, upon which the Court of Appeals bases its decision against the right of the City to take out of the Rio Grande water equal to the effluent it places in the Rio Grande. The Court of Appeals places great stress on the following sentence in said contract:

> "It is further understood that if such effluent is discharged into the Rio Grande, it constitutes a part of the Project water supply."

Certainly there is nothing in such statement to prevent the City from taking out as much water as the effluent it places in the Rio Grande, and certainly every known principal of equity would, as held by the Trial Judge, give the City this right of exchange. Especially is this true when the very life of the City depends on getting water from the Rio Grande to supplement its water well supply.

The Trial Court correctly held (R. 1726):

> "These views suggest strongly that the contract lacks the consideration ingredient and is illusory in its aspect as a compromise pact, but a definite ruling is unnecessary since that question does not control the decision of the Court, and, besides, said contract is revocable by either party upon reasonable notice at any time."

Petitioner cannot understand how the contract of August 10, 1949, which is lacking in both consideration and mutuality could be controlling in this instance.

## III.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. *Smith v. Grayson County*, 44 S.W. 921 (Texas Court of Civil Appeals, error refused); *Chicago, R. I. & Gulf Railway Co. v. Tarrant County Water Control & Improvement District No. 1*, 73 S.W. 2d. 55 (Texas Supreme Court); *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065 (U. S. Court of Appeals, Sixth Circuit); *State v. Emerson* (Delaware) 10 A. 2d. 515; *Commonwealth v. Inhabitants of Deerfield*, 6 Allen (Mass.) 456.

## ARGUMENT UNDER THIRD AND FOURTH QUESTIONS

The Honorable United States Court of Appeals for the Fifth Circuit erred in holding that the word "maintain" was used in the ordinance of the City of El Paso dated November 9, 1939, and the quitclaim deed from Petitioner City to Respondent United States of America, dated November 9, 1939, did not make Respondent District secondarily liable to maintain adequate bridges, including any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs required to keep the bridges at the specified crossings suitable and adequate for the present and future needs of all common traffic.

The Court of Appeals in its Opinion (R. 1814 to 1827) erred in holding that the word "maintain" did not require Respondents to build from time to time any bridges to keep pace with changing traffic conditions.

The Honorable Trial Court in his Opinion, held that the word "maintain" should not be given a "strait-jacket" definition, but should be given a definition which would carry out the intent of the parties. (R. 1706). It is inconceivable to Petitioner that the parties intended that Respondents expected the City to surrender its streets for occupancy by a canal without reserving the right to require Respondents to maintain structures suitable and adequate to serve the public traffic needs. The bridges which were constructed pursuant to the ordinance of December 11, 1913 (R. 855) certainly could not be used by present day traffic unless modern structures were erected. (R. 1239-1243).

The Record in this case shows that if the word "maintain" is given the meaning assigned to it by the Court of Appeals in its Opinion, Petitioner City could no longer use the bridges in question, but would be required, at its own expense, to construct adequate bridges.

The Petitioner City found it impossible to continue to use the original bridges, and after making request upon Respondent District, and after Congress refused to appropriate money for the construction of these bridges, then the City constructed two bridges at its own cost. The Trial Court allowed the City judgment for the cost of these bridges against Respondent District. (R. 1764). It is the position of Petitioner City that when Respondent District refused to maintain bridges adequate to meet traffic needs, and after Congress had refused to appropriate money therefor, City could construct these bridges and hold Respondent District liable for their payment.

In the case of *Davis Holding Co. v. Wilcox*, 153 A. 169, at page 172 (Conn.), it was stated:

"The word 'maintain' has no precise legal significance in a contract or statute."

In the case of *Rhodes v. Mumery*, 48 Ind. 216, the Court held that the word "maintain" used in connection with the maintenance of a partition fence was properly construed to require the fence to be rebuilt as well as repaired.

In the case of *City of Denver v. Denver City Cable Car Railway Company* (Colo.) 45 P. 434, at page 440, the Supreme Court of Colorado held that the word "maintain" means not only to repair, but to replace as well.

As the Trial Court pointed out, the word should not be made a prisoner of any "strait-jacket" out of the dictionary. In contracts, words are not detached abstractions, and must take color from the subject matter and object in mind (R. 1706).

In the case of *Chicago, R. I. & Gulf Ry. Co. v. Tarrant County Water Control and Improvement Dist. No. 1*, 73 S.W. 2d. 55 (Texas Supreme Court), the Court construed the obligation of a railroad company in constructing its roads across a stream of the Improvement Company, and laid down this rule at page 63:

> "The correlative duty of the appellant imposed by the statute granting the rights named was and is a continuing duty."

At page 69 it was stated by the Court:

> "The railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand."

Petitioner respectfully urges that the decision of the Court of Appeals was in direct and sharp conflict with the opinion of the Supreme Court of Texas in the case cited. The Texas Courts have also held that it is the duty of cities to maintain streets, and they can neither impair their duty to maintain streets nor contract away their duty to do so. In the case of *Smith v. Grayson County*, 44 S.W. 921 (Texas Court of Appeals, error refused) the Court, in construing a constitutional provision that the Legislature may pass local laws for the maintenance of public roads held that maintenance was not restricted to the upkeep of existing roads, but included the creating of a road system.

In *Tennessee Electric Co. v. White County*, 52 F. 2d. 1065, (United States Court of Appeals for the Sixth Circuit), the Power Company had agreed to construct and maintain certain bridges in order to get the County's permission to build a dam. Parts of the bridges were swept away by a flood, and the Company asserted it was not obligated to replace them because maintenance meant, at most, maintenance under ordinary conditions, just as is contended by Respondents in this case. The Court said at page 1066:

> "The weight of authority, in our opinion, is to the contrary. The cases in which a narrower construction has been adopted are distinguishable upon circumstances not found in the present case."

Apparently, the Opinion of the Court of Appeals for the Fifth Circuit in this case is in conflict with the Opinion of the Court of Appeals for the Sixth Circuit in the *Tennessee Electric Co.* case.

In the case of *State v. Emerson* (Del.) 10 A. 2d. 515, the Court stated:

> "The act, which is a department not only with the duty of laying out and constructing the highways, but to maintain them, and maintenance means not only the keeping in repair but also the continued existence of the highways as a system, arose for public use."

In the case of *Commonwealth v. Inhabitants of Deerfield*, 6 Allen (Mass.) 456, a corporation was obligated to maintain and keep a bridge in repair. A flood washed away part of the banks of the stream and widened the bed of the stream. The Court held that the Company was required to extend the bridges to the new banks thus created.

Petitioner respectfully but earnestly urges that the Trial Court did not base his Opinion in determining the meaning of the word "maintain" upon a context that is "no more expressive and no more accurate than was that used by that master philologist, Humpty Dumpty in his asseveration to Alice that words should be one's servant, not one's masters." (Opinion, page 8; R. 1821). On the contrary, the Trial Court followed the great weight of authority in the Federal Courts in the State of Texas, and in the Courts of many other states.

## IV.

The United States Court of Appeals in its Opinion decided an important State question in a way that is in conflict with the applicable State law. *Peoples v. Smith Bros.*, 65 S.W. 2d. 777; *Texas Company v. Texarkana Machine Shops*, 1 S.W. 2d. 928 (no writ history); *City of Beaumont v. Gulf States Utilities Co.*, 163 S.W. 2d. 426 (Texas Court of Appeals, writ refused); *Ennis Waterworks v. City of Ennis*, 144 S.W. 930 (Supreme Court).

## ARGUMENT UNDER FIFTH QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in holding that the ordinance and quitclaim deed of November 9, 1939 granted to the United States of America a perpetual right of way in the streets and alleys of the City of El Paso for the maintenance of an irrigation canal without compliance with the plain wording of the Charter of the City of El Paso (Sections 35, 36, and 37, Plaintiff's Exhibit No. 15, R. 227-229) (Appendix "A").

Petitioner, a municipal corporation, can act only under the authority of the State Law and its Charter. The Charter of the City of El Paso relating to easements in streets, and franchises in the streets is governed by Sections 35, 36 and 37 of the Charter of the City of El Paso. It is obvious from a reading of those sections that the City is without power to grant the United States of America an easement in its streets and alleys without complying with the Charter provisions. It is an elementary rule that the owner of land abutting on streets and alleys owns the fee to the center thereof, and a City does not have title to streets and alleys, and any Charter provision to the contrary is in violation of the Constitution of the State of Texas (Article 1, Section 17) (Appendix "D"). *Peoples v. Smith Bros.*, 65 S.W. 2d. 777

A case directly in point is *Texas Company v. Texarkana Machine Shops* (Texas Court of Civil Appeals), 1 S.W. 2d. 928 (no writ history) wherein the Machine Shops sued to enjoin the Texas Company and others to remove certain obstacles from an alleged public street. The Texas Company, Defendant, claimed that they held a deed from the City to the street, and that the City had, by ordinance, closed the same. It was Plaintiff's conten-

tion that the acts of the City in the passage of the ordinance, and in the execution of the deed was ultra vires the City, and was an attempt by the City to deprive Plaintiff of its property without just compensation, in violation of the State and Federal Constitution.

The Court in that case said at page 931:

> "The City or the State has no proprietary rights in the land covered by streets created by dedication or prescription."

We wish to invite the Court's attention to the fact that Respondents cannot successfully take the position that although they do not have title to that part of the streets occupied by the canal, nevertheless they have a perpetual easement for canal purposes covering such portions of the streets as set out in the ordinance and quitclaim deed of November 9, 1939 (R. 239-249).

The Courts of Texas have held to the contrary, and in the case of *Ennis Water Works v. City of Ennis*, 144 S.W. 930, it was stated at page 934 as follows:

> "Whatever may be the law of other states, it is undisputably the settled policy of this state, that monopolies and perpetuities shall not exist under sanction of law. It is therefore the duty of our courts to strike down with mailed hands every contract, whether granted under legislative *or in the exercise of municipal authority*, where exclusive rights and privileges are granted, to the inconvenience or detriment of the public interest." (emphasis supplied).

Respondents claim that the City is estopped to deny the validity of the ordinance and quitclaim deed. However, neither waiver nor estoppel applies to a municipality

when there has been an ultra vires act on the part of the municipality. A case directly in point is *Phillips v. City of Abilene* (no writ history), 195 S.W. 2d. 147. In that case, it was claimed that both waiver and estoppel applied in the face of an ordinance which prohibited officers of the City from waiving compliance with the ordinance as to notice in the case of personal injuries. The Court therein stated:

> "The doctrine of estoppel cannot be invoked to nullify a mandatory statutory restriction."

In this case, it will be noted that Section 37 of the Charter of the City of El Paso provides that "no mere acquiescence or other act or omission of the City Council or City Officers shall be held to confer by estoppel or indirection any such rights . . . ."

Petitioner respectfully urges that the Court of Appeals erred in affirming the Trial Court on this question, as the holding is in conflict with the opinions of the Supreme Court of the State of Texas.

## V.

The United States Court of Appeals in its Opinion decided important Federal questions contrary to the former decisions of the Supreme Court of the United States, and also contrary to former decisions of the other United States Courts of Appeals.

The United States Court of Appeals in its Opinion decided important State questions in a way that is in conflict with the applicable State Law.

*Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332; *Nebraska v. Wyoming*, 295 U.S. 40, 55 S. Ct. 568; *Ickes v. Fox*, 57 S. Ct. 412, 300 U.S. 82; *Louisiana v. Texas*, 20 S. Ct. 251, 176 U.S. 17; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 301 U.S. 92, 58 S. Ct. 803; *Texas Company v. Burkett*, 296 S.W. 273 (Supreme Court of Texas); *Humphreys-Mexia Co. vs. Arseneaux*, 297 S.W. 225; *Nolte Irrigation Co. v. Willis*, 180 S.W. [illegible] 451 (Court of Civil Appeals, writ refused); *United States v. Union Gap Irrigation Company*, 209 F. 274.

## ARGUMENT UNDER SIXTH QUESTION

The Honorable United States Court of Appeals for the Fifth Circuit erred in enjoining the City of El Paso, its Mayor, Engineers, and members of its Public Service Board, Superintendent of Water Works, and its agents and representatives, and the successors of each and all of them, from taking water from the river bed of the Rio Grande, or from the Franklin Canal, except in the manner, and in accordance with the rights of said City of El Paso as fixed and determined by the contract of August 10, 1949, which contract is without consideration, and lacks mutuality.

Petitioner earnestly urges that no injunction should have been issued against it in this case prohibiting Petitioner from taking water that it was legally entitled to take from the Rio Grande under the decisions cited herein. The Honorable Trial Court correctly held that Petitioner

under the law was entitled to take an amount of water from the Rio Grande equal to the effluent which the City placed in the Rio Grande.

The Trial Court held that the Rio Grande Compact between the States of Texas, New Mexico and Colorado, were committed to the primary service of the Bureau of Reclamation's Rio Grande Project. The United States Court of Appeals, by implication at least, affirmed this holding. It is Petitioner's earnest belief that both Courts erred in so construing the Rio Grande Compact as it has no bearing upon the distribution of water among the residents of a State once the water reaches such State, and under the authorities cited herein only, the State has control of such water.

Petitioner respectfully urges that no injunction should have been issued against it either by the Trial Court or the Court of Appeals, which would restrain it from taking water out of the Rio Grande, as it seeks to do in this case.

The Trial Court correctly held that the contract of August 10, 1949 was valid only in its aspect as a rental of Project works for use in delivery of water to Petitioner (R. 1727). The contract was for excess waters for which Respondents could have no further use, and to which they had no rights since the Reclamation Act permitted them only a right to water for beneficial use. *32 Stats.* 388, 390.

## CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the proceedings of that Court therein being the case numbered and entitled on its docket as "El Paso County Water Improvement District No. 1, et al vs. City of El Paso, No. 15954;" and that the Judgment of that Court be reviewed and reversed by this Court, and that Judgment be rendered in favor of Petitioner, and that Petitioner have such other relief as it may be entitled to, either at law or in equity.

TRAVIS WHITE
c/o City Hall
El Paso, Texas

H. E. BROCKMOLLER
El Paso National Bank Building
El Paso, Texas

ALLEN R. GRAMBLING
HAROLD L. SIMS
El Paso Natural Gas Company Building
El Paso, Texas

*Attorneys for Petitioner*

Travis White, one of the counsel preparing the foregoing Petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same, and that such Petition is not interposed for delay.

TRAVIS WHITE

I, TRAVIS WHITE, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the.....day of June, 1957, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

on: Eugene T. Edwards, Esquire, attorney for Respondents, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers.

and on: J. Lee Rankin, Solicitor General; David R. Warner, Attorney, Department of Justice; and William H. Veeder, Attorney, Department of Justice, being the attorneys for Respondent, United States of America, said copies to the attorneys for Respondent, United States of America, having been mailed in individually addressed envelopes with airmail postage prepaid.

TRAVIS WHITE

SUBSCRIBED AND SWORN TO before me this 17th day of June, A. D. 1957.

Maria Ellen Youngblood

Notary Public, El Paso County, Texas

## Appendix "A"—Sections 35, 36 and 37, Plaintiff's Exhibit No. 15, being portions of the Charter of the City of El Paso

*Section* 35. The right of control, easement, user and the ownership of and title to the streets, highways, public thoroughfares and property of the City of El Paso, its avenues, parks, bridges, and all other public places and property are hereby declared to be inalienable, except by ordinance duly passed by a vote of three-fourths of all the members of the Board of Aldermen and approved by the Mayor; and no grant of any franchise, or lease, or right to use the same, either on, along, through, across, under or over the same to any private corporation or individual, shall be granted by the City Council for a longer period than thirty years.

The City Council, may, upon its own motion, submit any applications or ordinances requesting the granting of franchises or special privileges in or to the streets, public thoroughfares and highways of the City of El Paso, to an election, at which the qualified ad valorem taxpayers shall vote upon the propositions therein submitted, the expense of which election shall be paid by the applicant or applicants therefor. No such franchise shall ever be granted until it has been read in full at two regular meetings of the Council, nor shall any such franchise, grant, right or easement ever be made to any private individual, corporation, or association unless it provides for adequate compensation therefor, to be paid to the City of El Paso, and in addition to any other form of compensation grantee shall pay annually such a fixed charge as may be prescribed in the franchise. Such grant under and any con-

tract in pursuance thereof shall provide that upon the termination of the grant, the grant as well as the property if any, of grantee, in the streets, avenues and other public places, shall thereupon, without other or further compensation to the grantee, or upon the payment of a fair valuation therefor (the mode of ascertaining which shall be determined in the grant), be and become the property of the City of El Paso, and the grantee shall never be entitled to any payment or valuation because of any value derived from the franchise or the fact that it is or may be a going concern duly installed and operated.

Every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and to maintain the property in good order throughout the life of the grant.

*Section* 36. Whenever application is made to the City Council of the City of El Paso for any grant or franchise, lease or right to use the streets, public highways, thoroughfares or public property of the City of El Paso, as provided for in the preceding section of this Act, before such ordinance or franchise is introduced in the City Council, it shall be published in full in some daily newspaper published in the City of El Paso twice, the first publication being made at least one week before same is introduced in the City Council. When the same has been passed on its first reading it shall be laid over for at least one week and published in full one time as finally proposed to be passed. If previous to the next regular meeting, four hun-

dred ad valorem taxpayers of the City of El Paso shall, over their own signatures, request the Council to submit the passage of such ordinance and franchise to a vote of the qualified ad valorem taxpaying voters of the City of El Paso, it shall be the duty of the City Council to submit such question to the qualified ad valorem taxpaying voters of the City, and the council shall order and the Mayor shall issue his proclamation calling such election and such ordinance and franchise shall be printed in full in such proclamation, and shall not thereafter be amended or changed. If, at such election, the majority of the votes shall be in favor of said franchise and ordinance, the same shall thereupon become effective, but if the majority of the votes cast be against said ordinance and franchise, the same shall not pass nor shall it confer any rights, powers or privileges of any kind whatever upon the applicant therefor, and it shall be the duty of the City Council to forthwith repeal said ordinance and franchise.

*Section 37.* No railroad company, street, steam, nor other kind, no telephone, telegraph, electric light, gas company, nor company of any kind, nor person, nor corporation shall ever occupy or use the streets, highways or public places of the City of El Paso for any purpose whatsoever, without first obtaining the consent of the City Council evidenced by the ordinance duly enacted, and no mere acquiescence or other act or omission of the City Council or city officers shall be held to confer by estoppel or indirection any such rights and the provisions of this section shall apply to such rights heretofore and now claimed by them.

## Appendix "B"—Rio Grande Compact, Article 7466e-1 of the Revised Statutes of Texas

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of the States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider

For the State of New Mexico—Thomas M. McClure

For the State of Texas—Frank B. Clayton

who, after negotiations participated in by S. O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following Articles, to-wit . . . .

## Appendix "C"—Reclamation Act, Title 43 U.S.C.A., Section 383

Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

## Appendix "D"—Constitution of Texas, Article 1, Section 17

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made, but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Appendix "E"

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

*Appellants and Cross-Appellees,*

versus

CITY OF EL PASO,

*Appellee and Cross-Appellant.*

(AND REVERSE TITLE)

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas

(April 2, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge: El Paso Water Improvement District No. 1, organized under the laws of Texas, five individual land owners, all in the Texas unit of the Rio Grande Federal Reclamation Project, and the United States of America as plaintiffs, brought this suit against the City of El Paso, a Texas municipal corporation, situated in the extreme western limit of the state on the north bank of the Rio Grande River.

The relief sought was the establishment and enforcement as between plaintiffs and the defendant of their respective rights to the use of the water of the river and, as a determining factor therein, the validity and effect of several written contracts between the United States and the plaintiff district, on the one hand, and the defendant City of El Paso, on the other, wherein, for stated considerations, the defendant was given the right to secondary use of the water of the Rio Grande, and, under certain circumstances, the right to use project facilities.

The City contested the claims of the plaintiffs and denied the validity of the ordinances and contracts, including a deed of the city, relied on by plaintiffs.

By way of counter-claim, it sought a recovery from the District of moneys collected from the City for project waters furnished the City and for the use of equipment and facilities, and an injunction against refusing the City free use of the facilities in future.

A further claim was that the United States and the District were liable to it for $51,397.69 for the cost of bridges which the City had been compelled to build across the Franklin Canal because, though under the deed from the City the United States and the District were to keep and maintain bridges across the canal, they had failed to do so.

Finally, attacking the contracts relied on by plaintiffs as invalid and as not having the effect claimed for them, the City sought, as plaintiff had done, a judgment declaring and enforcing its rights.

Thereafter, the case was fully tried to the court without a jury and as fully briefed and argued, and the district judge filed a thoroughly worked out and exhaustive opinion.[1] In it succinctly but comprehensively stating

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1 El Paso Water Impr. District No. 1, et al vs. City of El Paso, 133 F. Supp. 894 to 927, inclusive.

and documenting the facts and issues and the conclusions of fact and law controlling his decision, he canvassed, discussed, and disposed of, in the main in plaintiffs' favor, the material contentions and counter-contentions of the parties, and entered judgment accordingly. Both plaintiffs and defendants have appealed.

By their appeal, plaintiffs test for error and seek to reverse the portions of the judgment adverse to them, while the defendant, by its cross-appeal, tests for error and seeks to reverse the adjudications contrary to its contentions.

The district judge, in his general grasp of the issues involved and of the law relating thereto, and in the accuracy and precision of his statement of the facts, out of which the issues arise, has done a thorough and workmanlike, indeed a monumental job of setting the case forth in its particulars and as a whole. Because he has, we will not attempt here a general restatement of either the facts or the controlling principles of law. Instead, with respect to the contentions of the parties, as to which we agree with the district judge, we will, stating that we do, refer to and adopt as our own his discussion and decision of the law and the facts; while, with respect to the contentions as to which we disagree with him, we will make a brief statement of our reasons for so doing.

In this view, it becomes unnecessary for us to discuss many of the matters dealt with in the briefs. This is particularly so as to plaintiffs' contention, that the waters of the Rio Grande were committed to the primary service of the Rio Grande Project prior to the effective date of the Rio Grande compact between Colorado, New Mexico and Texas, and the district judge erred in not definitely so declaring. It is sufficient for the purpose of this appeal

to say: that the district court, on grounds sufficient to support the finding, adjudged that they were committed to such primary service; that the water supply contracts of Feb. 18, 1941 and December 1, 1944, between the United States, the District, and the City of El Paso "are valid in all parts"; that the contract of August 10, 1949, between the City and the District "is valid in its aspect as a rental of project works for use in delivery of water to the defendant; and that, in our opinion, it is valid in all its aspects."

Disposing first of the city's cross appeal and the attacks upon the judgment it puts forward, it is sufficient to say that, upon the facts found and for the reasons assigned by the district judge, we are of the clear opinion that none of them are well founded and that, as against each claim of the cross-appeal, the judgment must be affirmed.

Of the opposite opinion as to those parts of the judgment complained of in plaintiffs' appeal,[2] we shall, in

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[2] While the brief for all of the appellants, except the United States, presents 14, and that of the United States presents 11 specifications of error, the only provisions of the judgment under attack are those declaring

(1) That plaintiffs, United States and the District, failed to perform their bridge maintenance obligations at the Piedras and Verde Street crossings of the canal, but "the governing contingency bars primary liability of the plaintiff United States ... wherefor the secondary liability of the District is in effect", and accordingly, the defendant city is awarded judgment in the total sum, including interest, of $44,053.95 for expenses incurred by it in placing reasonably adequate bridges over the canal at those streets.

(2) That the obligation to "maintain" bridges at certain points includes the obligation to rebuild and replace such bridges though in a good state of repair.

(3) That El Paso County Water Improvement District No. 1 is liable to City of El Paso for cost of replacing bridges of different structural design.

(4) That the City of El Paso may take "pay free" from the Rio Grande an equivalent of the amount of sewage effluent voluntarily dumped into the river by it.

addition to declaring that these portions of the judgment may not stand, and that as to them the judgment must be reversed, state as briefly as possible our reasons for thinking so.

Further, since the appeal is from the judgment and not from the opinion, and it is our view that the decision of each of the questions raised by appellants' attack upon the judgment is governed by the written instruments the plaintiffs rely on, that it must be based upon the principles of law which govern their construction and application, we shall, though the opinion and the briefs took wider range, confine the discussion in our opinion within those limits.

Turning first to the matters having to do with bridges, and dealt with, in the court's opinion at pp. 910 to 916, under the head "Franklin Canal", and at pp. 916 to 918 under the head "Bridges", and in Pars. III and VIII of the decree under the same head, and Par. IX "Money Judgments", we find ourselves in complete agreement with the opinion of the district judge, and with Par. III of his

decree adjudicating, that the deed from the City conveying to the United States all of the City's right, title and interest in and to the right-of-way occupied by the Franklin Canal, along and across the streets, alleys, and other public lands of the City of El Paso, is valid and binding upon both grantor and grantee.

We cannot, however, reconcile with this conclusion and decree, and, therefore, cannot agree with the further conclusion in the opinion under the head "Bridges" and in the adjudication in Par. VIII in the decree that the burden of maintenance in respect to bridges imposed by the contract[3] "includes any and all reasonable replacements, re-

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[3] In these terms: "This conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at said described crossings, contingent, however, upon appropriations being made therefor by congress, and there is further reserved to the said City of El Paso, the right to construct and maintain at its own cost and expense such additional bridges and other structures across said canal other than those hereinabove designated as it may deem necessary". El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. at p. 917

building, restoration, enlargement, reinforcement and repairs of said bridges which may be required to keep at the specified crossings bridges suitable and adequate for the present and future needs of all common traffic at each of said locations, whatever the growth in such traffic density over the years". Neither can we reconcile them with the conclusion that the obligation extends to two new bridges constructed by the City at Piedras and Verde Streets, respectively, or with the provision in the decree under the head of "Money Judgments", adjudging that the plaintiff district is liable for $44,053.95 expenses incurred by the City therefor.

It seems to us that, with nothing in the record upon which to base such a finding, the district judge has in effect found that the United States and the District assumed a potential liability of incalculable and undeterminable extent and amount.

The briefs of the parties cite and argue decisions construing the word "maintain" in various contexts. While it seems to us that appellants have far the better of that kind of argument, we are of the opinion that the case is not one which requires or permits of resort to interpretation or construction, but one in which the plain and simple language of the deed under the undisputed facts compel the rejection out of hand of the construction given by the court to the language and the reversal of those portions of the decree which declare the obligation and its breach and impose a money judgment therefor.

The trial court, in his opinion, recognizing the dictionary meaning of the word "maintain", declared:

> "The word 'maintain' when directed to the subject of some structure ordinarily means to keep it in repair and in virtually the same serviceable state. At the same time the words should not be made a prisoner of any strait jacket out of the dictionary."

We think with appellants that this is an excessive figure of speech. We think, though, that in context it is no more expressive and no more accurate than was that used by that master philologist, Humpty Dumpty in his asseveration to Alice that words should be one's servants, not one's masters, and that when he used a word he expected it to mean what he chose it to mean. We agree with appellants also that it is not supported by either Texas decisions or decisions generally. Cf. *Malone v. El Paso Co., etc.*, 20 SW 2d 815, in which the Court of Appeals said, "The term maintain in Webster's International Dictionary, which has become in effect a law book on questions, is defined to mean to hold or keep in any particular state or condition, to support, to sustain, to uphold, to keep up* * *". Cf. also *Hobby v. Hodges*, 215 F 2d 754.

Applying these principles to the word "maintain" used in the deed under which the United States holds, it is quite plain that, in its common acceptance, it simply did not mean anything like what the court held that it did. The distinction between construction and maintenance was recognized by the City of El Paso in the deed itself when it reserved the right to CONSTRUCT and MAINTAIN at its own cost "additional bridges across the canal at other points".

With all deference to the conscientious and able district judge, we are of the firm opinion that he entirely lost sight not only of the definitive language consciously used in the deed but of the circumstances under which the deed and contract were made when he held that the clear and simple language of the deed, which referring to the 31 bridges named declares the obligation of the United States with respect to them to be to *maintain* those bridges, "imposes an obligation *to build from time to time new bridges of an entirely different construction and design to keep pace with changing traffic conditions.*" Emphasis supplied.)

Having held that the contract does not impose a liability for the construction of bridges of the kind in question here or for payment for those already constructed, and that the adjudications in Par. VIII under the head of "Bridges" and in Par. IX of "Money Judgments", must be reversed, it is unnecessary for us to determine or even to consider appellant's contention that even if the United States did make itself liable, as claimed by the city, the district could not be held liable therefor, secondarily or otherwise.

When we come to the question of the "sewage effluent,"[4]

[4] This is dealt with directly in the opinion of the district court under that head at pp. 925-6, and indirectly under the head of "Contract of Aug. 10, 1949" on pp. 922-24 of the opinion and in the decree under Par. IV "Contracts" and Par. VI "Effluent Offset".

we find the district judge rejecting, as without material bearing on it, both the contract of August 10, 1949, and the compromise settlement of the contest over the City's application to the Texas Board of Water Engineers for a permit.

Having thus put aside as of no weight, and denied effect to, matters of contract which seem to us controlling, the district judge, declaring:

> "The fair and equitable rule is that the City for the foreseeable future should be entitled to make direct diversions for municipal use from the river without having to pay for such water so long as such diversions are less in value than the outfall to the river."

stated: "The City has no traditional riparian right to exercise, but it is located on the river, with many miles of river frontage, * * so there is no strain of equity in saying" that it must be regarded as in as good a position as one who, having no water rights, takes water, is yet not held liable for so taking it to persons who are unable to demonstrate any substantial or tangible injury therefrom.

Appellants, joining issue with these views, point out that the City has never been a part of the Rio Grande Project; that it has never, since the project was established had any but a contract right with that project to take water from the Rio Grande; and that the permit of May 10, 1950, issued by the Texas Board of Water Engineers, to be applied to the waters if any in that area

over which it may have jurisdiction, does not in terms or by inference purport to authorize *the City to take from the Project waters the equivalent of sewage dumped into it.* So pointing they insist that, under the circumstances, the City in the absence of a contract authorizing it to do so, cannot lawfully take project water *which, by the express agreement of the city, the sewage effluent is when it reaches the river, while it is still under control of the Bureau of Reclamation;* that for an even stronger and better reason, the contract of August 10, 1949, definitely determines that the defendant has no such right; and that, in holding merely that this contract was valid in its aspects as rental of project facilities and not holding that it was valid in all respects, the court erred.

We agree with the appellants and think that a brief reference to some of the provisions of the contract and the circumstances under which it was executed, will conclusively demonstrate the correctness of their claims.

Among the provisions of the Contract are these:

> "Whereas, there has been appropriated under the laws of New Mexico and Texas, for and on behalf of the Rio Grande Federal Irrigation Project, comprising lands of the district and the Elephant Butte Irrigation District * * * and the *district claims all such appropriations cover all of the appropriable Waters of the Rio Grande River for the irrigation of lands in said districts;* and
>
> "Whereas, the city has urged a claim in equity against the project for sewage effluent placed in the river from the city's operation of its sewage and water systems * * *; and

"Whereas, *it is the desire of the district and of the city to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims involving relative rights and priorities* of the use of the waters hereinabove referred to, * * *;

"Now, therefore, it is agreed: (1) that the district, subject to approval hereof by the Secretary of the Interior of the United States, will permit use, by the City, of Rio Grande Project Works serving the district lands for the purpose of its agreement * * * *all as determined by the Project manager of the Rio Grande Project.*" (Emphasis supplied.),

Par. 2 gives the city the right, under stated conditions to take from the river, water in excess of Project needs. Par. 7 fixes the consideration the city is to pay, and Par. 10, reciting that the city is now discharging and may in future discharge sewage effluent, goes on to provide:

"It is expressly understood that in executing this contract or accepting the benefits thereof, the city shall not be held to have anywise *relinquished, modified, or impaired its title to, or ownership of, the right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that if such effluent is discharged into the Rio Grande, it constitutes a part of the Project water supply.*" (Emphasis supplied.)

In the light of these provisions of the contract and of the further facts noted in the opinion of the court: that "the contest over the defendant's application for a permit did not come to a showdown"; and that "under the contract in question, the protestants withdrew their opposi-

tion and defendant was left free to prosecute its application to a conclusion but with the reservation that any permit would be subject to the terms and conditions of this undertaking"; it seems entirely clear to us that the contract binds the city against, and prevents, the assertion of, the claim it now makes.

Apparently of the opinion that the settlement was not binding because, as he states, the district had nothing to sell except the use of its project facilities, the district judge seems to have gone off on the theory that the contract was lacking in mutuality and was not supported by consideration. In so holding, we think it plain that he erred. It is too well settled to require much citation of authority that a bona fide contest furnishes adequate consideration for a contract of settlement. *U.S. v. Westside Irrigation Co.*, 230 Fed. 284. Texas law is firmly established that valuable consideration for a contract is either benefit to the promisor or detriment to the promisee, or a surrender by the promisee of some legal right. An inspection of the various provisions and paragraphs of the contract of August 10, 1949, discloses full and adequate consideration to support all of its undertakings and obligations, and, in addition, after its execution, the City of El Paso recognized the contract of August 10, 1949, as binding on it and accepted the benefits conferred thereby.

Further, on the first day of December, 1949, there was a written contract entered into between the City, the District, the United States, the Department of the Interior, the Rio Grande Project, and others, and filed in a proceeding before the Board of Water Engineers in which it was agreed that the contract of August 10, 1949, had been executed, that it became effective as of September 23, 1949, that it now stands as a valid and binding con-

tract between the City of El Paso, applicant herein, and the Water District, and that said contract is now in full force and effect.

It is established without dispute: that plaintiff district and the others withdrew their protests against the application of the city for a permit under a stipulation that the board should grant the city's application, subject to the terms and conditions of the contract of August 10, 1949; and that after the Board of Water Engineers on May 8, 1950, had issued to the City a permit based on its application, purporting to authorize it to divert from the river, under stated conditions, a certain quantity of the public water of the State of Texas, the City of El Paso and the El Paso District in writing, dated June 22, 1950, again agreed with each other that the permit was subject to the contract of August 10, 1949, which it was further agreed was still in effect.

While the defendant in its brief, urges in opposition to these views that it is equitably entitled to take from the river as much as it puts into it, citing *Texas Co. v. Burkett*, 296 SW 273 and *Humphreys v. Arseneaux*, 297 SW 295, it also denies that the contract of August 10, or any of the contracts has any valid bearing in the case.

We do not think there is any sound basis for either of these positions, and we are in no doubt that the complained of provisions of the decree were erroneous and must be reversed.

The decree appealed from will be AFFIRMED as to all of cross-appellant's claims against it. As to appellants' claims against it, it is REFORMED in accordance herewith, and, as reformed, it is AFFIRMED.

Appendix "F"

## JUDGMENT

### Extract from the Minutes of April 2, 1957

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

No. 15954

versus

CITY OF EL PASO.

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the decree of the said District Court appealed from in this cause be, and the same is hereby, affirmed as to all of cross-appellant's claims against it, as to appellant's claim against it that said decree be and it is hereby, reformed in accordance with the opinion of this Court, and as reformed, it is affirmed:

It is further ordered and adjudged that the appellants & cross-appellees, El Paso County Water Improvement District No. 1, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs and W. L. Summers, and the surety on the cost bond herein, General Casualty Company of America, Seattle, Washington, be condemned, in solido to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix "G"

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15954

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

*Appellants and Cross-Appellees,*

versus

CITY OF EL PASO,

*Appellee and Cross-Appellant.*

AND REVERSE TITLE

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas

(May 24, 1957.)

## ON PETITION FOR REHEARING

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for

rehearing in the above entitled and numbered cause be, and it is hereby

DENIED.

CAMERON, Circuit Judge, Dissenting:

Upon reading again the opinion of the Trial Judge, as reported in 133 F. Supp. pp. 894-927, I am impressed anew with the fact that the case was skilfully handled and properly decided in the Court below by a Judge who spent much time in its trial, much study in mastering the intricate questions of mixed law and fact involved, and who brought to its decision much wisdom based upon long experience with those problems and an intimate knowledge of the local conditions involved in their solution. I find myself unable to subscribe to a conclusion at war with those upon which the judgment of the Court below was entered.

I would grant the petition for rehearing, set aside the order entered pursuant to the opinion of this Court filed April 2, 1957, and would enter a judgment affirming *in toto* that of the Court below. I dissent, therefore, from the order denying the petition for rehearing.

## Appendix "H"

### Order Staying Mandate Filed:—June 1, 1957

### UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1, ET AL.,

*Appellants and Cross-Appellees,*

No. 15954

versus

CITY OF EL PASO,

*Appellee and Cross-Appellant,*

(AND REVERSE TITLE)

ON CONSIDERATION OF THE APPLICATION of the Appellee & Cross-Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate

of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 1st day of June 1957.

J. C. HUTCHESON, JR.

*United States Circuit Judge.*